

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**OCT 03 2007**

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

ESTATE OF WILLARD SWORDEN, by  
and through Personal Representative, Scott  
Sworden, and SCOTT SWORDEN,  
individually,

Plaintiffs - Appellants,

V.

REYNOLDS METALS CO, a Delaware  
Corporation, ALCOA INC., a  
Pennsylvania corporation, and ESIS, a  
Pennsylvania corporation,

Defendants - Appellees.

No. 05-35794

D.C. No. CV-04-01048-HU

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Oregon  
Dennis James Hubel, Magistrate Judge, Presiding

Submitted September 26, 2007<sup>\*\*</sup>  
Portland, Oregon

Before: SCHROEDER, Chief Circuit Judge, SILVERMAN and BYBEE, Circuit  
Judges.

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without  
oral argument. *See* Fed. R. App. P. 34(a)(2).

The facts and procedural posture of the case are known to the parties, and we do not repeat them here. Appellants present three challenges to the district court's grant of Appellees' motions for summary judgment on the limited issue of workers' compensation exclusivity. We address each in turn.

First, Appellants argue that the remedy clause in Article I, section 10 of the Oregon Constitution prevents application of the exclusive remedy provision of the Oregon Workers' Compensation Act, OR. REV. STAT. § 656.001 et seq ("OWCA"), to foreclose a civil action for wrongful death. The remedy clause only protects common law causes of action recognized when the Oregon Constitution was adopted. *See Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 358-59 (Or. 2001). Oregon courts have repeatedly found no common law action for wrongful death. *See, e.g., Kilminster v. Day Mgmt. Corp.*, 919 P.2d 474, 479 (Or. 1996); *Greist v. Phillips*, 906 P.2d 789, 796-97 (Or. 1995). Most recently, in a case decided after submission of the briefs in this case, the Oregon Supreme Court declined to reconsider its prior holdings that wrongful death was not a cause of action recognized at common law. *Juarez v. Windsor Rock Prods., Inc.*, 144 P.3d 211, 215 (Or. 2006). Sitting in diversity, we must follow the prevailing Oregon law that such a claim did not exist at common law.

Second, Appellants argue that even if a direct employer is entitled to immunity, a parent corporation cannot receive the same benefit. Oregon courts have not yet addressed whether immunity is only available to the direct employer or also to its parent corporation when the action involves alleged misconduct solely on the part of the direct employer. The cases that have been decided allege independent misconduct by the relevant party. *See Osborn v. Crane Equip. Mfg. Corp.*, 897 P.2d 1192, 1194 (Or. Ct. App. 1995); *accord Woodling v. Garrett Corp.*, 813 F.2d 543, 549-50 (2d Cir. 1987); *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 657-58 (6th Cir. 1979). Other states' courts have held that a parent corporation is not subject to liability for injuries to employees of its subsidiary unless the parent corporation commits a separate act of negligence. *See, e.g., Waste Mgmt. Inc. v. Superior Court of San Diego*, 13 Cal. Rptr. 3d 910, 916 (Ct. App. 2004); *Hinkle v. Delavan Indus., Inc.*, 24 F. Supp. 2d 819, 822 (W.D. Tenn. 1998). We predict that Oregon would follow the logic of these decisions. To hold otherwise "would result in treating the parent as an employer without providing it with the shield of employer immunity under workers' compensation laws." *Waste Mgmt. Inc.*, 13 Cal. Rptr. 3d at 914. Appellants did not assert any facts supporting a claim of independent misconduct by the parent corporation.

Third, Appellants argue that the fraud and breach of fiduciary duty claims should not be subject to the exclusive remedy provision of OWCA. These claims are based on the assumption that since the workers' compensation claim was initially denied, and then subsequently granted, the acceptance was fraudulently issued to prevent recourse to a civil claim. Because these causes of action are direct challenges to the processing of the workers' compensation claim, they are subject to the exclusivity provision. *See* OR. REV. STAT. § 656.018(1)(a); *Gordineer v. Bellotti*, 785 P.2d 362, 364 (Or. Ct. App. 1990). Furthermore, applying the exclusive remedy provision to the fraud and breach of fiduciary duty claims does not violate the remedy clause. *See Smothers*, 23 P.3d at 359.

The district court's grant of summary judgment is **AFFIRMED**.